Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RENEE SOPER, a minor, by her mother and next friend, LINA SOPER, and LINA SOPER, individually,
Petitioners,

v.

CHRISTINE A. HOBEN, MICHELLE HARMALA, ROBERT SHAW, JAMES H. DOYLE, HURON VALLEY SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE HURON VALLEY SCHOOL DISTRICT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mrs. Soper specifically informed Ms. Harmala that Boy A had previously taken Renee off school property and kissed Renee. Mrs. Soper told Ms. Harmala that she did not want Renee left alone with Boy A because Mrs. Soper was concerned with what Boy A might do to Renee. On the first day of school, Ms. Harmala left Renee and Boy A together in the classroom during the lunch. Boy A raped Renee.

The Sixth Circuit held that this fact pattern does not present facts upon which a reasonable person could conclude the school district had actual notice of sexual harassment of Renee by Boy A, or that the school district acted with "deliberate indifference" towards the sexual harassment of Renee By Boy A. The question presented is:

Does a parent informing a teacher of emotionally impaired children of a previous incident of sexual harassment by one of the teacher's students on another student in the same class create a question of fact as to whether the school district had actual notice of the sexual harassment prior to the rape and whether the school district reacted with deliberate indifference towards the sexual harassment of one student against the other?

PARTIES TO THE PROCEEDINGS

Petitioners

Renee Soper, a minor, by her mother and next friend, Lina Soper, and Lina Soper, individually. Petitioners are individuals and have no corporate affiliations.

Respondents

Christine A. Hoben, Michelle Harmala, Robert Shaw, James H Doyle, Huron Valley School District and The Board of Education of the Huron Valley School District.

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PETITION FOR WRIT OF CERTIORARI

Lina Soper respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 2, 1999, in order to resolve the conflict between the Sixth and Tenth Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reprinted in Appendix A hereto ("App. A") at page 1a. By order filed December 6, 1999, the Sixth Circuit denied the petition for rehearing. App. B, 26a.

JURISDICTION

On April 1, 1998, the United States District Court for the Eastern District of Michigan issued an Order Granting Defendants' Motion for Summary Judgment. Plaintiffs filed a timely appeal. On November 2, 1999, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Eastern District of Michigan. On November 16, 1999, Plaintiffs timely filed a Petition for Re-Hearing. The United States Court of Appeals for the Sixth Circuit denied Plaintiffs' Petition for Re-Hearing on December 6, 1999. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED IN THIS CASE

20 U.S.C. Section 1681(a) provides:

> (a) **Prohibition against discrimination; exceptions.** No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that. . .

STATEMENT OF THE CASE

Renee Soper is an adopted foster child of Plaintiff Lina Soper and her husband, Bruce. She was born to a mentally retarded mother and was the product of her father's incestuous relationship. When she was placed in the care of foster parent, Lina Soper, she was malnourished. As she grew, it was noted that her language skills were significantly delayed.

Renee has been enrolled in the Huron Valley Public Schools since age 4. She is learning disabled and has attended special education or "educated mentally impaired" classes since second grade. The school conducted yearly Individualized Educational Planning Committee meetings at which Mrs. Soper and Renee's teacher would attend and discuss the educational/social/physical needs for Renee as an EMI student. Individualized Educational Planning Committee (IEPC) reports were prepared for each of these meetings that

included a determination whether the student was eligible for continued special education programs.

Renee has the characteristics of a Down Syndrome child in that she exhibits a lot of hugging, particularly with adults. Renee was sexually abused by one of her foster brothers at age nine (9) and had previously undergone psychological therapy. Prior to Muir Middle School, Renee attended Oxbow Elementary. In May, 1994, Mrs. Soper attended an IEPC meeting at which it was recommended that Renee continue in the EMI Program at Muir Junior High. Michele Harmala was designated as the teacher responsible for implementing the IEP and also attended the meeting. The IEPC report lists Renee's cognitive level of functioning at age 7 years, 6 months, although her chronological age was 12 years.

In addition, psychological evaluations were performed and psychological reports issued periodically on Renee throughout her school years in 1987, 1989, 1991 and in May and December, 1994. The May, 1994 report recommends Renee for the EMI basic classroom program at Muir Middle School and that her "main streaming be increased in that setting" even though her "adaptive behavior does not appear normal or close to a fifth grade level of independent functioning when compared to normal peers." The report noted that her "social responsibility and personal independence [are] still quite deficient for her age." Although there is detailed family history information in the December, 1994 psychological "history report"; there is *no* mention in the 1991 report of Renee's abuse by her brother.

Previously, Mrs. Rombach, Renee's teacher at Oxbow, had informed her of an incident in 1993 when Boy A who was also a student at Oxbow and Renee had left the

boundaries of the school together. Renee later told her mother that Boy A had kissed her and told her he couldn't wait for her to come to junior high school. She told Mrs. Rombach of the reported kissing incident, and asked to make sure that somebody's keeping an eye on Renee and Boy A so they would not be together and it would not go any further than that. She had attempted to talk to Renee about not being old enough for a girlfriend/boyfriend relationship, but "its like talking to a five year old. You think that she's got some of it down and some of it didn't absorb." At the May IEPC meeting which Mrs. Harmala also attended, Mrs. Soper discussed Renee's history of sexual abuse by her foster brother; this was what in part prompted her to discuss the matter with her about Boy A. Renee is ". . . so trusting with people, so she wants to believe in people and do what they tell her to do. She . . . loves to be hugged and that's one of the characteristics she's had ever since she was small child." *See also* EXH G Huron Valley Schools--Individual Student Summary 3/91: "Renee is very attention seeking . . . She has a constant need to touch whomever it is she is with. . ."; and EXH H, Huron Valley Schools--Parent Questionnaire 1/24/91, p.3: "She is very emotional toward people she loves to be hugged etc. Sometime she goes to strangers and hangs onto them and we talk to her about it. She still does it. . . ."

Ms. Harmala's response to Mrs. Soper's request was: "*We'll keep an eye on the, children. They're well supervised.*" Ms. Harmala went on to explain: ". . . the way the classroom was run and how they were supervised going to classes and how the teachers are out in the hallways . . . so I assumed that she would always be under someone's watchful eye."

In fact, Renee had previously been under the watchful eye of the School District; specialized transportation

information forms attached to IEPC reports for 1992 and 1993 requested that Renee *not* be left unattended.

Renee Soper attended Muir Middle School in August, 1994 under the control and supervision of the Huron Valley School District that provided for a "mainstream" program of placing EMI students into a regular school environment. The special education classroom at Muir was referred to as the "back room." The doors to the classroom and the copy room were solid doors without glass. Her special education teacher was Defendant Michele Harmala who was hired into the school district in August, 1990. The school principal was Defendant Christine Hoben. Defendant Robert A. Shaw was the Director of Special Education. Defendant James H. Doyle was the Superintendent of Schools.

At the initial meeting at the beginning of the school year at Muir Middle School in the fall of 1994, Mrs. Soper expressed further her concern to Ms. Harmala about Boy A and Renee. Mrs. Rombach also attended this meeting. In addition to discussing the kissing incident with Mrs. Harmala, Mrs. Soper was aware of *Boy A's abusive family background, and she told Ms. Harmala that she did not want her daughter left alone with Boy A.*

Sometime later at a scheduled teacher conference meeting in October, Mrs. Soper told Ms. Harmala how Renee did not want to get up for school, looked depressed, and didn't seem happy with junior high school. She came home and when she discussed the matter further with Renee, her sister Wendy revealed that there had been problems between Boy A and Renee. Renee broke down crying uncontrollably and told her everything that happened including not only the rape incident with Boy A, but other sexual encounters with Boys B and C fondling her breasts and vagina at school and

on the school bus, all of whom had threatened to beat her if she told anyone. *She told her mother that the teacher allowed Boy A to accompany Renee to her locker to assist her in getting the door open, and that while Mrs. Harmala was busy locking up the classroom for lunchtime, Boy A told Renee to conceal herself in the back room, and after the teacher left, he raped her*. She also told of incidents where one of the other boys fondled her *in the back of the classroom while the teacher was outside in the hallway*. Renee was too scared to tell her teacher or her mother

Mrs. Soper immediately returned to the school that night, confronted the teacher and the principal, and took Renee to the police station.

Only *after the reported rape did the HVS School District implement several remedial measures*. Initially the principal had the doors changed to install windows, and rules were implemented to require passes to be in the hallway, an aide to accompany the students on the bus, etc.

The Plaintiffs filed their action in Oakland County Circuit Court. Defendants removed the cause to federal district court. The district court dismissed Plaintiffs' Title IX claims stating that for a school district to be held liable under Title IX the school board had to have actual knowledge of the sexual harassment before the school district could be held liable for acts of student on student sexual harassment and asserted the school district did not have such notice. The district court issued its order granting summary judgment on April 1, 1998.

Between April 1, 1998 and November 2, 1999, the day the Sixth Circuit issued its opinion affirming the decision of the district court, the U.S. Supreme Court issued its decision

in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In *Davis*, the U.S. Supreme Court held that liability under Title IX properly attaches to the school district when the sexual harassment "takes place while the students are involved in school activities or otherwise under the supervision of school employees." *Id.* at 1672-73.

Despite the decision of the U.S. Supreme Court, the Sixth Circuit did not request the parties submit additional briefing as to how the *Davis* decision would effect this cause of action, did not remand this action to the district court to make additional findings, but instead asserted the school district did not have any notice of Boy A's sexual harassment of Renee, although Mrs. Soper had specifically informed Ms. Harmala that Boy A had previously taken Renee off school property and kissed her, and Boy A had repeatedly told Renee she was going to be his girlfriend when she got to Junior High. The Sixth Circuit stated the school district did not have notice although Mrs. Soper had specifically told Ms. Harmala she did not want Renee left alone with Boy A.

The Sixth Circuit also stated a reasonable person could not conclude that the school district did act with "deliberate indifference towards Boy A's sexual harassment of Renee because of how the school district responded after it found out Boy A had raped Renee. It did not state why Ms. Harmala's leaving Boy A and Renee alone in a classroom after Mrs. Soper had specifically told Ms. Harmala, Boy A had previously taken Renee off school property and specifically told Ms. Harmala she did not want Boy A and Renee left alone together could not found by the jury to constitute "deliberate indifference."

The Honorable Karen Nelson Moore stated in her dissent the following:

Turning to the Title IX claim, I agree with the majority that it is the federal recipient and not the individual defendants that can be liable for sexual discrimination under Title IX, but I disagree that this cause of action should have been dismissed on summary judgment. The majority asserts that the Sopers have not presented evidence that the school district or the school board had actual notice of the harassment and were deliberately indifferent to it. If one considers as harassment only the incident of Renee's rape by Boy A, that assertion is correct. When the school learned of the rape, it did take steps to investigate and to prevent recurrence of a similar incident in the future. But if one considers the earlier incidents between Boy A and Renee to be harassment - incidents known to some of the defendants and reported to Renee's teachers as a matter of concern by Renee's mother -- the school did have notice of harassment. Although assurances were given, no steps were actually taken to minimize or stop the harassment. The specific request that Renee not be alone in the presence of Boy A was ignored. Arguably, these actions amounted to deliberate indifference to the concerns about harassment brought to Renee's teachers by her mother. I believe that the Sopers at least should have been given the opportunity to make the case that the school's actions amounted to a violation of Title IX, and that dismissal on summary judgment was inappropriate.

The Sixth Circuit entered its order affirming the Judgment of the district court on November 2, 1999.

The Sopers filed their Petition for Re-Hearing on November 16, 1999. The Sixth Circuit denied the Sopers' Petition for Re-Hearing on December 6, 1999.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Opinion Directly Conflicts With The Tenth Circuit's Ruling in *Murrell* And is Contrary To The Rule That Issues of Material Facts Are To Be Decided By The Jury At Trial And Not On Summary Judgment.

The decision below is in direct conflict with the Tenth Circuit's decision in *Murrell v. School District No. 1*, 186 F.3d 1238 (1999). Certiorari is appropriate here. *See Davis v. Monroe County Board of Education,* 119 S.Ct. 924, 930 (1999) (Court granted petition to resolve a conflict in the Circuits over whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment)

The Tenth Circuit in *Murrell* held that a school district had actual notice when a parent had informed a school official of sexual harassment by a student against her daughter when both students were under the principal's control. The Tenth Circuit stated in *Murrell v. School District No. 1*, 186 F.3d 1238, 1247 (1999) the following:

> Davis makes clear, however, that a school official who has the authority to halt known

> abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision, would meet this definition.
>
> Turning to Ms. Murrell's complaint, we conclude that she has sufficiently alleged actual knowledge and deliberate indifference. Ms. Murrell alleged that she telephoned Principal Johnston to discuss Mr. Doe's harassing conduct, and therefore that the principle had actual knowledge of the assaults at least as of the time Ms. Jones was in the hospital.

The facts alleged in the Sopers' complaint and supported by deposition testimony would have created a question of material fact for the jury to determine if Defendant School District had actual notice of the sexual harassment.

Murrell presents the better reasoned approach. It allows the jury to determine if Mrs. Soper informed Ms. Harmala of the previous sexual harassment. It also allows the jury to determine if Ms. Harmala, leaving Boy A and Renee alone after Ms. Harmala had been specifically warned about Boy A's previous sexual harassment of Renee, constituted "deliberate indifference," or Ms. Harmala's response to the information Mrs. Soper gave her was "clearly unreasonable in light of known circumstances."

While *Murrell* allows material facts to be decided by a jury at trial, the decision below allows the decision making power of the jury to be taken from it. The reasoning of the Sixth and Tenth Circuits creates conflicting results on the issue of Actual Notice on nearly identical facts. In *Murrell,*

the parent informing a school official of an act of sexual harassment by one student on another student placed the school district on actual notice of harassment; in the instant case, a parent informing a school official of a previous act of sexual harassment by Boy A against her daughter, did not provide the school district with actual notice of harassment. The conflict is clear and irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed November 2, 1999]

No. 98-1550

RENEE SOPER, a minor, by her mother and next friend, LINA SOPER; LINA SOPER, individually, *Plaintiffs-Appellants,*	)
v.	)
CHRISTINE A. HOBEN; MICHELLE HARMALA; ROBERT SHAW; JAMES H. DOYLE; HURON VALLEY SCHOOL DISTRICT; BOARD OF EDUCATION OF THE HURON VALLEY SCHOOL DISTRICT, jointly and severally, *Defendants-Appellees.*	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

Before: KENNEDY, SILER, and MOORE, Circuit Judges.

OPINION

SILER, Circuit Judge. Plaintiffs, Renee Soper, a minor, by her mother and next friend, Lina Soper, and Lina Soper, individually, appeal the district court's grant of summary judgment to defendants in this action for negligence and gross negligence under state law, violations of 42 U.S.C. § 1983, and violations of 20 U.S.C. § 1681. For the following reasons, this court AFFIRMS.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case involves the harassment, sexual molestation, and rape of a female special education student by three of her classmates at school and on the bus. The crux of the case is who, if anyone, may be held liable for Renee's injuries under federal or state law.

Factual Background

Renee is a mentally retarded adopted foster child. Because of her learning disability, Renee attended special education or "educable mentally impaired" ("EMI")[1] classes

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[1] Educable Mentally Impaired means a person identified . . . as having all the following behavioral characteristics:

> (a) Development at a rate approximately 2 to 3 standard deviations below the mean as determined through intellectual assessment.

starting in the second grade at Oxbow Elementary of the Huron Valley Public Schools ("HVPS"), but also attended certain mainstream classes outside the special education program, to which she would walk unattended. Each year, the school conducted an Individualized Educational Planning Committee ("IEPC") meeting, which Ms. Soper and Renee's teachers would attend to discuss Renee's educational, social, and physical needs. Additionally, psychological evaluations were performed periodically and reports issued on Renee throughout her school years.

Both Ms. Soper and Renee's teacher, Kathy Rombach, noticed that Renee engaged in frequent hugging of other adults and children while in grade school, a common characteristic of Down's Syndrome children. While the hugging was not sexual in nature, the two women worked to decrease the behavior. In 1993, while Renee was a student at Oxbow Elementary, Boy A (who is one or two years older than Renee and was then a student in defendant Michele

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> (a) Development at a rate approximately 2 to 3 standard deviations below the mean as determined through intellectual assessment.
> (b) Scores approximately within the lowest 6 percentiles on a standardized test in reading and arithmetic.
> (c) Lack of development primarily in the cognitive domain.
> (d) Unsatisfactory academic performance not found to be based on [her] social, economic and cultural background.

Rule 340.1705, Michigan Administrative Code.

Harmala's EMI classroom in the middle school) and Renee left the school boundaries together. Later, Renee told her mother that Boy A had kissed her and said that he could not wait for her to come to junior high. Ms. Soper reported the incident to Rombach and asked her to make sure that someone would keep an eye on Renee and Boy A so as to prevent any further incidents. Boy B and Boy C were also in Rombach's EMI class with Renee. While at Oxbow, Renee never encountered any problems with Boy B or Boy C.

At an IEPC meeting in May 1994, before Renee entered Muir Middle School, it was decided that Renee would continue in the EMI program.[2] Harmala was designated as the teacher responsible for implementing Renee's IEP. The IEPC report lists Renee's cognitive level of functioning at age seven years and six months, although her chronological age was twelve years. At the May meeting, Ms. Soper contends that she discussed Renee's history of sexual abuse by her foster brother,[3] as well as the incident with Boy A in elementary school. In response to Ms. Soper's concerns, Ms.

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[2] Renee's May 1994 psychological report recommended her for the EMI basic classroom program at Muir Middle School and that her "main streaming be increased in that setting" even though her "adaptive behavior does not appear normal or close to a fifth grade level of independent functioning when compared to normal peers." The report also noted that her "social responsibility and personal independence [are] still quite deficient for her age."

[3] At the age of nine, Renee was sexually abused by one of her foster brothers. As a result, she has undergone psychological therapy.

Soper submits that Harmala said, "we'll keep an eye on the children. They're well supervised." Harmala denies that Ms. Soper mentioned Boy A to her as a concern or that she assured Ms. Soper that Renee would be supervised at all times while she was in school. Ms. Soper did not voice any concerns about Boy B or Boy C.

Renee entered Muir Middle School in August 1994. At that time defendant Christine Hoben was the school principal; Ronald Mango was the assistant principal; defendant Robert Shaw was the Director of Special Education; and defendant James Doyle was the Superintendent of Schools. Renee was placed in Harmala's EMI classroom [4] with ten other students.[5] Boy A, Boy B, and Boy C were also in this class. Although Harmala had requested an aide because of the increasing number of students and because of the multi-station curriculum in her class, one was not provided.

At the initial meeting at the beginning of the 1994 school year, Ms. Soper expressed further concern about Boy A to Harmala. (Rombach also attended this meeting.) At the time, Ms. Soper was aware of Boy A's abusive family background, and told Harmala that she did not want her daughter left alone with Boy A. Harmala denies having heard this. Additionally, Harmala, who had taught Boy A for the

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[4] The special education classroom at the middle school was referred to as the "back room." The doors to the classroom and the copy room were solid doors without glass.

[5] The maximum number of children allowed in an EMI classroom is fifteen.

two previous years, submits that she never observed any sexually aggressive behavior by Boy A toward other students in the class. Likewise, a psychological evaluation performed in May 1994 on Boy A revealed no inappropriate sexual behavior by Boy A.

On the evening of October 6, 1994, Ms. Soper met with Harmala for a scheduled parent-teacher conference and raised the following issues regarding Renee: (1) diet; (2) hygiene; (3) locker problems involving another student; (4) bra-snapping; and (5) story telling. When Ms. Soper returned home, Renee told her that Boy B and Boy C fondled her breasts and vagina at Muir Middle School in the back of the classroom while the teacher was outside in the hallway, that the boys did the same on the school bus, and that Boy A had raped her at school. As to the latter incident, she explained that her teacher allowed Boy A to accompany her to her locker to assist her in getting the door open, and that while Harmala was locking up the classroom for lunchtime, Boy A told her to hide in the back room, and that after the teacher left, he raped her. She reported that all the boys had threatened to beat her up if she told anyone. Boy A alleges that the sexual penetration was consensual and Boy B and Boy C deny any sexual misconduct.

Ms. Soper confronted Harmala and Hoben immediately and then reported the incidents to the police. The next day, Harmala reported Renee's allegations to Child Protective Services and contacted Renee's mainstream teachers to arrange for a plan of increased supervision of Renee while in school. Harmala, Hoben, Mango, and Shaw

met to discuss the allegations and an immediate investigation[6] as well as a plan for Renee's protection while in school. They prepared a plan for increased supervision of Renee while in school, including an escort. However, Ms. Soper opted to keep Renee at home, as Boys A, B, and C were allowed to continue attending Muir Middle School during the police investigation.[7]

After the reported rape, the HVPS District implemented several remedial steps: (1) windows were installed in the doors; (2) an aide was placed in Harmala's classroom; (3) the hall pass rule was implemented; and (4) an aide accompanied students on the bus. Furthermore, Renee and Boys A, B, and C were advised to attend student counseling sessions concerning how to function socially with the opposite sex.

While the police conducted a criminal investigation they did not communicate the preliminary findings to the HVPS. In January 1995, after the school received word that Boy A would be charged, he was suspended under threat of expulsion for the remainder of the year. Boy B and Boy C

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[6] Mango separately interviewed Boys A, B, and C, as well as the bus driver, who denied knowledge of any inappropriate behavior. Defendants contend that no facts came forward during the district's investigation to warrant disciplinary action against any of the boys.

[7] After the reported incident, the school continued to allow Boy A to work as an aide in the front office, but gave the staff instructions not to let him leave the office unaccompanied.

were not prosecuted and therefore not disciplined by the school. Renee voluntarily returned to school in January 1995.

Procedural History

The Sopers filed their complaint in the Oakland County Circuit Court, alleging claims for negligence, gross negligence, and violations of 42 U.S.C. § 1983 and 20 U.S.C. § 1681 ("Title IX"), against Harmala, Hoben, Shaw, Doyle, the HVPS District, and the HVPS Board. Defendants removed the action to federal court. The district court granted defendants' motion for summary judgment.

STANDARD OF REVIEW

Whether a district court correctly dismissed a suit pursuant to FED. R. CIV. P. 12(b)(6) is a question of law subject to *de novo* review. *See Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1138 (6th Cir. 1995). However, if the district court considered matters outside the pleading when ruling on a motion to dismiss, this court will treat the motion as one for summary judgment pursuant to FED. R. CIV. P. 56.

This court reviews an order granting summary judgment *de novo* and hence uses the same test as the district court. *See Harrow Prods., Inc. v. Liberty Mutual Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving for summary judgment bears the "burden of

showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence offered] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

ANALYSIS

Negligence and Gross Negligence

In response to the Sopers' state tort law claims of negligence and gross negligence, defendants Harmala, Hoben, Shaw, Doyle, the HVPS District, and the HVPS Board properly claim immunity.

Michigan statutory law provides for absolute immunity and governmental immunity from tort liability in certain situations. The relevant statute provides in part:

> (2) [Governmental immunity.] Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

(3) Subsection (2) shall not be construed as altering the law of intentional torts as it existed before July 7, 1986.

* * *

(5) [Absolute immunity.] Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

Mich. Comp. Laws. Ann. § 691.1407. The question is which, if any, type of immunity shields each defendant from the Sopers' state law claims.

Defendant Doyle

The district court correctly found that as superintendent of the HVPS District, defendant Doyle has absolute immunity pursuant to Mich. Comp. Laws Ann. § 691.1407(5). *See Nalepa v. Plymouth-Canton Comm. Sch. Dist.*, 525 N.W.2d 897, 901 (Mich. Ct. App. 1994) (holding superintendent of schools enjoys absolute immunity under the statute).

Defendants Harmala, Hoben, Shaw, the HVPS District, and the HVPS Board

These defendants are immune from suits for ordinary negligence under the statute. However, the Sopers argue that the following actions constitute gross negligence: (1) the failure to have a policy in effect to protect at-risk students like Renee; (2) Harmala's failure to supervise Renee so as to make sure that she was taken from the classroom to the cafeteria; and (3) the failure to place a paraprofessional in Harmala's classroom. The district court properly found that defendants Harmala, Hoben, Shaw, the HVPS District, and the HVPS Board are shielded from the Sopers' state tort claims by governmental immunity as set forth in Mich. Comp. Laws Ann. § 691.1407(2) because their conduct was not grossly negligent as a matter of law.

Gross negligence is defined in the statute as "conduct so reckless as to demonstrate a substantial lack of concern for

whether an injury results." Mich. Comp. Laws Ann. § 691.1407(2). Plaintiffs argue that because they have alleged "some" improper conduct on the part of defendants, whether it constitutes gross negligence within the meaning of the statute is a factual question to be determined by a jury. For this proposition, plaintiffs cite *Tallman v. Markstrom,* 446 N.W.2d 618, 619 (Mich. Ct. App. 1989) (finding plaintiffs complaint alleged sufficient conduct to support a claim of gross negligence and stating, "once a standard of conduct is established, the reasonableness of an actor's conduct under the standard is a question for the fact finder, not the court"). However, in *Vermilya v. Dunham,* 489 N.W.2d 496 (Mich. Ct. App. 1992), the Michigan Court of Appeals rejected the assertion that *Tallman* "precludes a grant of summary disposition in every case in which a plaintiff alleges that negligent conduct by a defendant government employee resulted in injury." *Id*, at 499. Rather, it held that the proper view is that "summary disposition is precluded in cases in which reasonable jurors could honestly have reached different conclusions with regard to whether the defendant's conduct amounted to gross negligence. However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary judgment should be granted." *Id*.

The district court correctly found that reasonable minds could not find that the failure to have a policy in effect to protect at-risk students and/or the failure to place a para-professional in Harmala's classroom constitutes gross negligence. Additionally, even assuming the Sopers' factual assertions are true regarding Harmala's knowledge and conduct, we agree that reasonable minds could not find that Harmala's conduct constitutes gross negligence.

42 U.S.C. § 1983

To state a claim under § 1983, the Sopers must establish that a person acting under color of state law deprived Renee of a federal right. *See Gomez v. Toledo,* 446 U.S. 635, 640 (1980).[8] The Sopers assert that defendants, acting under color of state law, violated Renee's constitutional right to equal protection and liberty as preserved by the Due Process clauses of the Fifth and Fourteenth Amendments.

Existence of a Constitutional Right
Equal Protection

In order to establish an equal protection violation, the Sopers must show that Renee's complaints were treated differently by the HVPS than were complaints by Renee's male counterparts. *See Soto v. Flores,* 103 F.3d. 1056, 1067 (1st Cir. 1997). In short, the Sopers must establish that the HVPS treated the complaints differently "because of, not merely in spite of, the harmful [disparate] effect that such treatment would have." *Doe v. Londonderry School District,* 970 F. Supp. 64, 77 (D. N.H. 1997) (internal quotations and citations omitted). The Sopers have not produced that evidence. The district court properly dismissed this claim.

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[8] "The second element requires the plaintiff to prove not only a deprivation of federal right, but also that the defendant's conduct was a cause in fact of the alleged deprivation." *Soto v. Flores,* 103 F.3d 1056, 1062 (1st Cir. 1997) (citing *Maldonado Santiago v. Valazquez Garcia,* 821 F.2d 822, 831 (1st Cir. 1987)).

Liberty Interest in Bodily Integrity

The Due Process clause protects the right against "unjustified intrusions on personal security" at the hands of the state. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Extrapolating, the Supreme Court has held that certain "special relationships" created or assumed by the State with respect to particular individuals may give rise to such an affirmative duty and are enforceable through the Due Process clause to provide adequate protection. *See DeShaney v. Winnebago County DSS*, 489 U.S. 189 (1989) (holding State did not have constitutional duty to protect a minor against violence committed by his father, a private actor). The purpose of the Due Process clause is "to protect people from the State, not to ensure that the State protect[s] them from each other." *Id* at 196. Recently, the Supreme Court has reiterated the narrowness of *DeShaney*, noting that it only limits "the constitutional duty of officials to protect against assault by private parties." *United States v. Lanier*, 520 U.S. 259, 272 fn. 7 (1997) (stating "*DeShaney* does not hold . . . that there is no constitutional right to be free from assault committed by state officials themselves outside of a custodial setting").

It is clear that a constitutional violation arises if a school official physically violates a student. *See, e.g., Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) (holding schoolchild's right to personal security and to bodily integrity manifestly embraces right to be free from sexual abuse at the hands of a public schoolteacher). However, the Sopers argue that Boys A, B, and C violated Renee's protected liberty interest in bodily integrity and that because the students who harmed Renee were under the control of the HVPS and

because HVPS had a "special relationship" with Renee, HVPS may be held liable for violating Renee's Due Process rights. The district court correctly found that this argument fails, as the facts at bar do not give rise to a constitutional violation. First, the persons who harmed Renee were private actors, not governmental or school officials acting under color of state law or pursuant to governmental or school policies. Additionally, there is no "special relationship" between the HVPS and Renee. *See Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995) (listing cases from other jurisdictions and holding that compulsory school attendance does not create a special relationship between school districts and their students that gives rise to an affirmative duty to protect its students). *See also Claiborne County*, 103 F.3d at 510 (listing cases from other jurisdictions and stating *"in loco parentis* status or state's compulsory attendance laws do not sufficiently 'restrain' students to raise a school's common law obligation [to create and maintain a safe environment for its students] to the rank of a constitutional duty").

Potential Liability of Defendants
Harmala, Hoben, Shaw, and Doyle

Governmental officials may be held personally liable for damages under § 1983 based upon actions taken in their individual capacities. *See Hafer v. Melo*, 502 U.S. 21, 27 (1991) (holding state officials sued in their individual capacities are "persons" within the meaning of section 1983). Generally, plaintiffs must designate in which capacity they are suing defendants; if not, by operation of law, defendants are deemed sued in their official capacities. *See Hardin v. Straub*, 954 F.2d 1193, 1199 (6th Cir. 1992); *Wells v. Brown*, 891 F.2d 591, 592-94 (6th Cir. 1989). Suing a public official

in his official capacity for acts performed within the scope of his authority is equivalent to suing the governmental entity. *See Kentucky v. Graham,* 473 U.S. 159, 166 (1985). In this case, plaintiffs failed to designate in which capacity they sued defendants. However, because the parties did not brief the issue of defendants' liability in this fashion, but rather discussed qualified immunity, this court will not affirm on the basis of plaintiffs' mis-designation. *Cf Abdur-Rahman v. Michigan Dep't of Corrections,* 65 F.3d 489, 491 (6th Cir. 1995).

A government official performing a discretionary function is entitled to qualified immunity from suit for civil damages unless his actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Accordingly, to survive a qualified immunity defense, plaintiffs must show that defendants, acting under color of state law, deprived Renee "of a right 'secured by the Constitution and laws.'" *Baker v. McCollan,* 443 U.S. 137, 140 (1979) (citations omitted). As discussed above, plaintiffs cannot show a violation of a constitutionally protected right. Accordingly, defendants are entitled to qualified immunity in their individual capacities.

The HVPS District and The HVPS Board[9]

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[9] The parties briefly mention Eleventh Amendment immunity. However, because the HVPS District and the HVPS Board are not arms of the State, the discussion of Eleventh Amendment immunity is misplaced.

A local governmental entity may be held liable under 42 U.S.C. § 1983 for violations of federal law committed pursuant to a governmental "policy or custom." *See Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658, 694 (1978). A school district is a local governmental entity. *See Lopez v. Houston Ind. Sch. Dist.,* 817 F.2d 351, 353 (5th Cir. 1987). It logically follows that a school board is also a local governmental entity.

In order for plaintiffs to prevail on their § 1983 claim against the HVPS District and the HVPS Board, they must establish that the HVPS official policy or custom caused the alleged constitutional violation. *See Monell,* 436 U.S. at 694. However, because there is no constitutional violation, as discussed previously, no further analysis is warranted.

20 U.S.C § 1681

The Sopers bring their Title IX claim against all named defendants for sex discrimination based on student-on-student sexual harassment. Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
> . . .

20 U.S.C. § 1681.

Liability Under Title IX

When this action was argued on appeal, it was clear that an implied private right of action under Title IX existed, *see Cannon v. University of Chicago,* 441 U.S. 677, 691-94 (1979), and that money damages were available in such suits, *see Franklin v. Gwinnett County Public School,* 503 U.S. 60 (1992). However, it was not until recently that a court with binding authority found that only recipients of federal funds may be liable for damages under Title IX. *See Davis v. Monroe County Bd. of Educ.,* 119 S.Ct. 1661,169-70 (1999) (citing *National Collegiate Athletic Assn. v. Smith,* 119 S.Ct. 924, 929, n. 5 (1999) (rejecting suggestion "that the private right of action available under . . . § 168l(a) is potentially broader than the Government's enforcement authority")). *See also Clay v. Board of Trustees of Neosho County Community College,* 905 F.Supp. 1488, 1495-96 (D. Kan. 1995); *Bowers v. Baylor Univ.,* 862 F.Supp. 142, 145 (W.D. Tex. 1994); *Doe v. Petaluma City Sch. Dist.,* 830 F.Supp. 1560, 1563 (N.D. Cal. 1993), *on reconsideration,* 949 F.Supp. 1415 (N.D. Cal. 1996). Accordingly, the district court correctly dismissed the Sopers' Title IX claim against defendants in their individual capacities.

Title IX Liability of a Federally Funded School for Student-On-Student Sexual Harassment

When this law suit was argued on appeal, it was known that sexual harassment of a student in a federally funded educational program or activity, if perpetrated by a teacher or other employee of the funding recipient, could render the recipient liable for damages under Title IX. *See Franklin,* 503 U.S. at 76. However, at that time, the circuits

were split on the issue of whether Title IX encompasses a claim for intentional discrimination on the basis of sex when grounded solely upon student-on-student sexual harassment. Since oral argument, the United States Supreme Court decided *Davis v. Monroe County Board of Education,* which established that Title IX may support a claim for student-on-student sexual harassment when the plaintiff can show (1) that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school, (2) that the funding recipient had actual knowledge of the sexual harassment, and (3) that the funding recipient was deliberately indifferent to the harassment. *Davis,* 119 S.Ct. 1666-71.

With respect to the first prong of the *Davis* test, there is evidence in the record to support the Sopers' assertion that Renee was raped and sexually abused and harassed. This obviously qualifies as being severe, pervasive, and objectively offensive sexual harassment that could deprive Renee of access to the educational opportunities provided by her school. However, it is the second and third prongs of the *Davis* test which Renee fails.

In the case at bar, defendants did not have actual knowledge of the harassment until after the fact and plaintiffs have failed to present any evidence of deliberate indifference attributable to defendants. Once they did learn of the incidents, they quickly and effectively corrected the situation. Defendants immediately contacted the proper authorities, investigated the incidents themselves, installed windows in the doors of the special education classroom, placed an aide in Harmala's classroom, and created student counseling sessions

concerning how to function socially with the opposite sex. Prior to ascertaining the results of their internal investigation and the police criminal investigation, defendants offered to increase the supervision of Renee while in school and provide her an escort. However, Ms. Soper chose to keep Renee at home. Ultimately, when defendants were advised of the results of the criminal investigation, they expelled Boy A. Regardless of Ms. Soper's choice not to allow Renee to return to school despite the accommodations, the HVPS District and the HVPS Board did correct the situation as soon as they had notice of the incidents.

In *Davis*, although the Supreme Court did not pass on the issue, it suggested that the petitioner might be able to show that the Board "subject[ed]" the petitioner's daughter, LaShonda, to discrimination "by failing to respond in any way over a period of five months to complaints of G.F.'s in-school misconduct from LaShonda and other female students." *Davis,* 119 S.Ct. at 1674. In comparison, the prompt and thorough response by school officials to the Sopers' complaint was not "clearly unreasonable in light of the known circumstances." *See id.* Accordingly, the district court correctly concluded that the Sopers cannot establish Title IX liability.

AFFIRMED

CONCURRING IN PART, DISSENTING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. Because I disagree with the majority's resolution of the state claim, and with aspects of the opinion on the federal claims, I respectfully

dissent from the affirmance of the grant of summary judgment.

Turning to the state tort claim first, the majority asserts as a matter of law and without analysis that the actions of the defendants did not amount to gross negligence under Michigan law. I do not agree. Specifically, whether the actions of Harmala amounted to gross negligence is a question of fact for the jury. Assuming the truth of the plaintiffs's assertions, as we must on a motion for summary judgment by defendants, Harmala was warned specifically about the conduct of Boy A when it came to Renee Soper. Renee's mother indicated that she did not want the two to be alone together and unsupervised at any time, and claims to have told Harmala of her concerns. Nonetheless, Harmala allowed Boy A to accompany Renee Soper to her locker and did not supervise them. They were able to conceal themselves from her at that time and the rape occurred shortly thereafter in the abandoned classroom, while the rest of the students were at lunch. I cannot agree that no rational jury could find that these facts, if proved, amounted to gross negligence on the part of Harmala.

I turn next to the § 1983 claims. The majority properly does not affirm the district court's presumption that the individual defendants were sued only in their official capacities. In this case such a presumption would be inappropriate. Our precedent, *Wells v. Brown,* 891 F.2d 591 (6th Cir. 1989), offers two reasons for its conclusion that a suit against state officials in a § 1983 action must make clear that they are being sued in their individual capacities: the necessity for proper notice to defendants that personal assets may be at risk in a cause of action, and the Eleventh

Amendment bar to suits against a state in federal court. In this case, neither concern is valid, and it is improper to presume an official capacity suit.

First, there is no indication that the defendants in this case were prejudiced by the omission. Their brief in support of the motion for summary judgment argues that the individual defendants are entitled to qualified immunity, which is a personal defense. This court has consistently distinguished *Wells* when the facts indicated that the defendants had actual or constructive notice of the capacity in which they were being sued. *See, e.g., Brown v. Shaner,* 172 F.3d 927, 933-34 (6th Cir. 1999) (Second Amended Complaint "related back" to original complaint as to capacity in which officers were being sued because alleged wrongdoing concerned personal conduct, defendants "should have known" they were being sued in their individual capacity, and they were not prejudiced in maintaining a defense on the merits); *Pelfrey v. Chambers,* 43 F.3d 1034, 1037-38 (6th Cir.) (separate motion filed one month after complaint provided sufficient notice of suit against defendants in individual capacity), *cert. denied,* 515 U.S. 1116 (1995); *Abdur-Rahman v. Michigan Dep't of Corrections,* 65 F.3d 489, 491 (6th Cir. 1995) (plaintiffs response to defendant's motion for summary judgment provided sufficient notice that defendant was being sued in his individual capacity).

The first mention of capacity as an issue in this case is the district court's order granting summary judgment. It does not appear that the plaintiffs were given an opportunity to amend their complaint. Until that point, both parties assumed the § 1983 action was in part a suit against the individual defendants in their personal capacity. This is clearly not a

case of prejudice to the defendants due to lack of notice about the nature of the suit against them -- both parties briefed qualified immunity to the district court and to this court. It strikes me as reminiscent of the hypertechnical pleading practice of days gone by for the district court simply to "read out" one of the plaintiffs's causes of action on the basis of a technical deficiency that went unrecognized by both parties, especially when no prejudice accrued to the defendants.

More important, the rationale of *Wells* depends on reading the Federal Rules of Civil Procedure in conjunction with federal Eleventh Amendment jurisprudence. The Federal Rules provide that "[i]t is not necessary to aver the capacity of a party to sue or be sued . . . except to the extent required to show the jurisdiction of the court." Fed. R. Civ. P 9(a). The *Wells* court therefore concluded on the facts before it that "because the Eleventh Amendment places a jurisdictional limit on federal courts in civil rights cases against states and state employees, we understand Rule 9(a) to *require* plaintiffs to properly allege capacity in their complaint." *Wells,* 891 F.2d at 593. The Eleventh Amendment is not at issue in this case, as the individual defendants here are municipal employees, and a § 1983 suit against a municipality is not barred by the Eleventh Amendment. As the Supreme Court has written, "[t]here is no longer a need to bring official-capacity actions against local government officials, for . . . local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham,* 473 U.S. 159, 167 n. 14 (1985). The Court went on to say that in cases where the complaint does not clearly specify the capacity in which officials are sued, "'[t]he course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed."

Id. The jurisdictional concern of *Wells* is not present here, and "the course of proceedings," as described above, indicates that personal liability was sought to be imposed.

The facts before us are much like those in *Perry v. Croucher*, No. 97-3033, 1998 WL 661151, at *7-*8 (6th Cir. Aug. 31, 1998), in which the complaint used language such as "willfully, maliciously, and with reckless indifference" to describe the defendant's actions, and the defendants pleaded personal immunity in response, acting "with the understanding that they were being sued in their personal capacities." *Id.* at *8. Here, the complaint alleges that the acts of the individual defendants were "reckless, wilful, wanton, malicious and\or intentional," J.A. at 23, it seeks relief from them "jointly and severally in an amount in excess of $10,000," J.A. at 24, and the defendants have acted at all times with the understanding that they are being sued in their individual capacities. For the above reasons, it was error for the district court to deem the § 1983 action as one against the defendants only in their official capacity. Therefore, I believe that the majority properly reaches the qualified immunity defense offered by the defendants and briefed by both parties.

Turning to the Title IX claim, I agree with the majority that it is the federal recipient and not the individual defendants that can be held liable for sexual discrimination under Title IX, but I disagree that this cause of action should have been dismissed on summary judgment. The majority asserts that the Sopers have not presented evidence that the school district or the school board had actual notice of the harassment and were deliberately indifferent to it. If one considers as harassment only the incident of Renee's rape by Boy A, that assertion is correct. When the school learned of

the rape, it did take steps to investigate and to prevent recurrence of a similar incident in the future. But if one considers the earlier incidents between Boy A and Renee to be harassment -- incidents known to some of the defendants and reported to Renee's teachers as a matter of concern by Renee's mother -- the school did have notice of harassment. Although assurances were given, no steps were actually taken to minimize or stop the harassment. The specific request that Renee not be alone in the presence of Boy A was ignored. Arguably, these actions amounted to deliberate indifference to the concerns about harassment brought to Renee's teachers by her mother. I believe that the Sopers at least should have been given the opportunity to make the case that the school's actions amounted to a violation of Title IX, and that dismissal on summary judgment was inappropriate.

For the foregoing reasons, I respectfully dissent from the opinion of the court in this case.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed April 1, 1998]

No. 96-CV-72227

RENEE SOPER, a minor, by her mother and next of friend, LINA SOPER, and LINA SOPER, individually,
Plaintiffs,

v.

CHRISTINE A. HOBEN, MICHELLE HARMALA, ROBERT SHAW, JAMES H. DOYLE, HURON VALLEY SCHOOL DISTRICT, and THE BOARD OF EDUCATION OF THE HURON VALLEY SCHOOL DISTRICT, jointly and severally,
Defendants.

JUDGMENT

This matter having come before the court on defendants' motion for summary judgment, and the court having entered its order granting defendants' motion;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment be and the same hereby is **GRANTED** and this cause of action **DISMISSED**.

Dated at Port Huron, Michigan this 1st day of April, 1998.

/s/_____
Robert E. DeMascio
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed April 1, 1998]

No. 96-CV-72227

RENEE SOPER, a minor, by her mother and next of friend, LINA SOPER, and LINA SOPER, individually,
Plaintiffs,

v.

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Defendants.

ORDER

Plaintiff filed this complaint alleging state law claims as well as various federal claims pursuant to 42 U.S.C. § 1983 and Title IX. Plaintiff named as defendants Christine A. Hoben, Muir Middle School principle, Michelle Harmala,

her teacher, Robert Shaw, director of special education, James H. Doyle, Huron Valley School District superintendent, the Huron Valley School District, and the Huron Valley School District Board of Education. We now have for resolution defendants' motion for summary judgment.

Plaintiff, Renee Soper, is a young girl who is educational but mentally impaired ("EMI"). She alleges that on or about September 1, 1994, she was a first year student at Muir Middle School when she was forcibly raped by a male EMI student in the school office copy room during lunch. She additionally alleges that on another occasion this same student, who worked in the copy room, sexually assaulted her in the copy room. This student was later charged with criminal sexual conduct in Oakland County. During the same school year, plaintiff alleges she was sexually harassed and accosted by two other male EMI students while riding home on a Huron Valley School District (HVSD) school bus. It is further alleged that these three male students continually fondled her breasts in the back of the class room during school hours. The identities of the boys are Boys A (the rapist), B and C.

Plaintiff is an adopted child who is the product of her fraternal father's incestuous relationship. She has been in the HVSD school system since the age of four. Plaintiff is learning disabled and attends special education classes. The school conducts yearly Individualized Educational Planning Committee meetings ("IPEC") where plaintiff's mother and her teachers meet and discuss plaintiff's educational, social and physical needs.

Prior to attending Muir Junior High, plaintiff attended Oxbow Elementary. In May of 1994, while at an IEPC meeting, it was recommended that plaintiff continue her EMI program while in Junior High. Defendant Harmala was designated as the teacher responsible for implementing the IEPC at Muir Middle School. While at Oxbow Elementary, plaintiff alleges that she and Boy A would go off beyond school boundaries and Boy A would kiss her. Mrs. Soper claims that these incidents were reported to Mrs. Rombach, her teacher at that time. She further asserts that at her final grade school IEPC meeting with Mrs. Rombach and defendant Harmala, Mrs. Soper requested that plaintiff not be left alone with Boy A; that she was assured that the children would be "well supervised."

Plaintiff began attending Muir Junior High in August of 1994 as part of the mainstream program that placed EMI students in a regular school environment. The special education room was called the "back room," because it had a solid door and no windows. At the initial IEPC meeting in the fall of 1994, Ms. Soper again expressed concerns about Boy A to defendant Harmala; and that at a later conference in October of 1994, she explained to defendant Harmala that Renee seemed depressed, did not want to go to school, and did not like junior high. Mrs. Soper claims after that conference, she talked with Renee who informed her about the rape and alleged harassment incidents.

Plaintiff contends that only after her rape was reported to the police did the HVSD implement several remedial measures. Initially, the principal had the "back room" doors changed, installed windows in the copy room and special education room, implemented rules requiring hall passes,

required an aide to accompany students to the bus, and advised plaintiff to attend student counseling groups in which the students were counseled about how to function socially with members of the opposite sex. Plaintiff claims that all three boys were allowed to stay in school without suspension while the Milford Police Department and the Oakland County Prosecutor's office were investigating. The school offered an aide for plaintiff at this time, but Mrs. Soper refused to allow plaintiff to go back to school, fearing for her daughter's safety.

Defendants state a number of further facts that are not contested by the plaintiff. They assert that plaintiff's parents permitted Renee to walk to classes unattended. While she was in grade school, plaintiff's parents gave the bus driver permission to drop her off in front of her home, whether or not anyone was home to receive her. Both Boys B and C were in plaintiff's EMI classes at Oxbow Elementary and plaintiff never had any problem with either Boy. At this time, Boy A, who was two years older than plaintiff, was in defendant Harmala's class at Muir Junior High. Defendant Harmala never experienced any aggressive behavior by Boy A with any other student. A psychological evaluation performed May 6, 1994, revealed no inappropriate sexual behaviors by Boy A. The school was aware of the Milford Police Department's criminal investigation but were not told of any of the police department's information. In January of 1995, Boy A was prosecuted, but Boys B or C were not. As a result, Boy A was immediately removed from school, and plaintiff returned to school.

PLAINTIFF'S STATE LAW CLAIMS

Defendant Doyle asserts that he is entitled to absolute immunity pursuant to M.C.L.A. § 691.1407(5) which provides:-

> Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

Plaintiff correctly points out that the Michigan Court of Appeals has held that a superintendent is not entitled to absolute immunity. See Giddings v. Detroit, 178 Mich. App. 749 (1989); Kirschner v. Carney-Nadeau Public Schools, 174 Mich. App. 642 (1989). However, after the enactment of M.C.L.A. § 691.1407, the Michigan Court of Appeals, relying upon the plain meaning of the statute, held that "the superintendent . . . is . . . absolutely immune from tort liability. . . . A superintendent of a school district . . . [is] appointed by the board. . . . The superintendent is also an executive official. . . . [T]he superintendent is the highest appointive executive of the school district." Nalepa v. Plymouth-Canton Schools, 207 Mich. App. 580, 589 (1994). Although the court would not find that Giddings and Kirschner were decided wrong, the court did note that they were decided prior to the enactment of M.C.L.A. § 691.1407. Id. at 590.

Plaintiff alleges that Doyle's actions were grossly negligent, and resulted in the harm that she suffered. Defendant Doyle's role as superintendent is to oversee the school district, and the day-to-day operations of the schools. Plaintiff's bare allegation that defendant Doyle was not acting within the scope of his authority prior to the incidents is insufficient to deny him absolute immunity. Once he was notified of the incidents concerning plaintiff, it was his duty to oversee the investigation, and to implement remedial measures to insure the future safety of the students in the school district. (Def's Mot. Sum. Judgment Ex. T). Plaintiff has failed to provide evidence that defendant Doyle did not perform these duties, or that he was acting outside of the scope of his authority. Accordingly, we grant defendant Doyle's motion for summary judgment

Plaintiff has alleged that the remaining individual defendants, Harmala, Hoben, and Shaw's actions or inactions were negligent and grossly negligent in violation of Michigan state law. Michigan's Governmental Immunity Statute, M.C.L.A. § 691.1407, provides:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or employee or member while in the course of employment or service

> or volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> > (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
> >
> > (b) The government agency is engaged in the exercise or discharge of a governmental function.
> >
> > (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless to demonstrate a substantial lack of concern for whether an injury results.

M.C.L.A. § 691.1407(2) (West, 1997).

Plaintiff claims that gross negligence within the meaning of M.C.L.A. § 691.1407(2) is a factual question to be determined by a jury. Tallman v. Markstrom, 180 Mich. App. 141, 143-144 (1989). However, in Vermilya v. Dunham, 195 Mich. App. 79 (1992), the court rejected the assertion that Tallman "precludes a grant of summary disposition in every case in which a plaintiff alleges that negligent conduct by a defendant government employee resulted in injury." Id. at 83. The court held that the proper view is that "summary disposition is precluded in cases in which reasonable jurors could honestly have reached different

conclusions with regard to whether the defendant's conduct amounted to gross negligence. However, if on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted." Id.

Plaintiff further claims that Muir Middle School and Huron Valley failed to have a policy in effect to protect at risk students; that defendant Harmala failed to supervise sixth grade student Renee Soper to make sure she was taken from the classroom down to the cafeteria; that defendants failed to replace a paraprofessional aide in Harmala's EMI classroom; and that a jury should determine whether defendants' actions or inactions constitute gross negligence. However, we find as a matter of law that these actions do not constitute gross negligence. Therefore, defendants are immune from plaintiff's state law claims pursuant to M.C.L.A. § 691.1407(2).

Plaintiff's argument that students in her position should have their own sexual harassment procedures is flawed because such a policy could bring about impermissible discrimination among students at varied educational levels. In any event, plaintiff failed to provide evidence that she was in need of any special protection. On the other hand, defendants provided uncontroverted evidence that Boy A had been in defendant Harmala's class for two years prior to the time plaintiff attended Muir Middle School and Boy A never displayed any sexual or aggressive behavior; that Boy A had a psychological evaluation that did not show any sexual or aggressive behavior; that neither Boy B or Boy C had shown any sexually aggressive behavior towards plaintiff prior to these events; that plaintiff had her parent permission, while at

Oxbow Elementary, to walk to mainstream classes unattended; and that plaintiff's parents allowed her to be dropped off from the bus whether or not someone was their to meet her. Assuming that Mrs. Soper informed defendant Harmala of her wish that plaintiff never be left along with Boy A, which allegedly resulted from a kissing incident, the fact remains that the rape by Boy A was not a foreseeable event. We find that there is no factual support for plaintiff's claim of gross negligence against defendants Harmala, Hoben, and Shaw, and, accordingly, their motion for summary judgment is granted.

PLAINTIFF'S 42 U.S.C. §1983 CLAIMS

Defendant HVSD argues that plaintiff's 42 U.S.C. § 1983 claim must be dismissed as she has failed to demonstrate that sexual harassment by another student presents a cognizable constitutional claim. Plaintiff argues, that even though the United States Supreme Court has not addressed student-on-student sexual harassment, there is sufficient case law in the circuits that recognizes such a cause of action. Plaintiff further argues that due to the custom and policy of the school district, plaintiff's school has failed to train, evaluate, supervise or discipline its employees and agents as to student-on-student sexual harassment, and thereby deprived plaintiff of equal protection and due process of law. Plaintiff also argues that HVSD owed her a special duty, because a special relationship was created between her and Muir Middle School.

First, we reject plaintiff's claim that she was denied equal protection. To prevail on such a claim, plaintiff must show that her complaints were treated differently by HVSD

than complaints by boys. Doe v. Londonerry School Dist., 970 F.Supp. 64, 77 (D.N.H. 1997). Plaintiff failed to produce evidence that she has been denied equal protection by HVSD based upon her sex.

Additionally, we disagree with plaintiff's argument that HVSD failed to train its agents and employees which caused a violation of her constitutional rights. Plaintiff makes a bare assertion that HVSD has a custom and policy of allowing such actions, without providing any evidentiary support. "[T]he specific deficiency or deficiencies must be such as to make the specific violation 'almost bound to happen, sooner or later,' rather than merely 'likely to happen in the long run.'" Spell v. McDaniel, 824 F.2d 1380, 1390 (4th Cir. 1987). In her response, plaintiff recites HVSD's written policy on sexual harassment, and tries to assert that no such policy exists. HVSD's written policy statement clearly shows that such a policy is in place. Moreover, plaintiff has failed to provide the court with any evidence that student-on-student sexual harassment is occurring as a result of HVSD's improper implementation of its policy.

Nor has plaintiff provided evidence that a special relationship existed between her and HVSD. The United States Supreme Court addressed the issue of a special relationship in DeShanney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189 (1989). In DeShanney, even though petitioner was beaten and abused by his father, and Social Services was advised of this abuse, Social Services allowed petitioner to stay in his father's custody. Id. at 192. During this two year period, petitioner was beaten so severely that he fell into a life threatening coma, and was permanently brain damaged as a result. Id. at 193. Petitioner sued under 42

U.S.C. §1983 alleging that a special relationship had arisen between the state and petitioner due to Social Services' knowledge and involvement. However, the Court found that a special relationship did not exist. Id. at 197-98. The Court held that "when the State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Therefore, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." Id. at 199-200; see also D.R. by L.R. v. Middle Bucks Area Vo. Tech. School, 972 F.2d 1364, 1372 (3rd Cir. 1992) ("[T]he school defendants' authority over [plaintiff] during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in DeShanney, particularly when their channels of outside communication were not totally closed."); Dorothy J. v. Little Rock School Dist., 7 F.3d 729 (8th Cir. 1993); B.M.H. by C.B. v. School Bd., 833 F.2d 560 (E.D.Va. 1993); Doe v. Petaluma City School Dist., 830 F.Supp. 1560 (N.D.Cal. 1993) rev'd on other grounds 949 F.Supp. 1415 (N.D.Cal. 1996) rev'd on other grounds 54 F.3d 1447 (9th Cir. 1995).

In response, plaintiff argues that her case falls within the exception created by DeShanney, and its progeny. Relying upon Sargi v. Kent City Board of Ed., 70 F.3d 907 (6th Cir. 1995), she claims that the Sixth Circuit has left the window open to allege a "special relationship" claim against a school district. While we agree that there are certain limited situation where a plaintiff may allege a "special relationship" against a school district, this is not such a case.

Plaintiff asserts that she was under control, custody and supervision of defendant HVSD while at school, on the bus, and during their decision making. However, plaintiff has failed to produce competent evidence to raise a genuine issue of material fact that defendant HVSD took plaintiff into custody and left her with no options to care for herself.

> Rather, it is the parents who decide where the student will go to school; the parents may remove the child from classes (subject only to truancy penalties . . .), even when the student is enrolled in public school; the parents remain the primary care takers of their children; and the children are only at school during part of the day and remain residents of their homes. Thus, . . . students 'may turn to persons unrelated to the state for help on a daily basis.'"

Petaluma, 830 F.Supp. at 1579, citing D.R. by L.R., 972 F.2d at 1369-73. The school district did not create the dangers plaintiff faced nor made her more susceptible to them.

We find the Middle Bucks, Dorthy J., B.M.H. by C.B., Petaluma, and Londonderry cases persuasive. Even though plaintiff's argument that there are situations where a school would have a special relationship with its students has merit, it is not the case here. A school does have a duty under state law to protect students, but this duty is not enough to place on the school district the burden to protect each student from other students in all circumstances.

Further, plaintiff has also failed to state whether she is suing the individual defendants in their official or individual capacities. Like HVSD, these defendants are immune from suit under 42 U.S.C. § 1983 in their official capacities. Hafer v. Melo, 112 S.Ct. 358, 361-62 (1991). Since plaintiff has not indicated what capacity she is suing defendants, this court will presume she is suing defendants in their official capacity. Sanderferfer v. Nichols, 62 F.3d 151, 152 n.1 (6th Cir. 1995). It is so essential to afford defendants their right to prepare a defense, plaintiff has an affirmative duty to make clear to defendants the capacity in which she brings suit. See Wells v. Brown, 891 F.2d 591 (6th Cir. 1989). Even if plaintiff did intend to sue defendants in their individual capacity, we would still find plaintiff failed to state a claim against the defendants' in their individual capacity.

Plaintiff contends that defendants failed to exercise reasonable care and supervision over plaintiff, and failed to implement the written procedures to make students and faculty aware of how to deal with sexual assault. Defendants contend that in their individual capacity they are entitled to a qualified immunity under 42 U.S.C. § 1983. First, plaintiff asserts that she was entitled to protection from Boy A, who she alleges has a history of problems, but plaintiff has not provided evidence to support this claim. Defendant Harmala has testified that she never had a problem with Boy A prior to the incident with plaintiff, and a prior psychological exam of Boy A showed no sexually aggressive tendencies.

It appears that plaintiff is arguing that defendants created the danger that caused plaintiff's injuries by not supervising the students, and not implementing a proper sexual assault program. This court needs to ask "whether the

state actors involved affirmatively acted to create plaintiff's danger, or to render her more vulnerable to it." Middle Bucks, 972 F.2d at 1373. Defendants had a sexual assault policy in place, there were no suspicious circumstances that would put them on notice, the bus driver testified that she never noticed any unusual behavior between plaintiff and Boys B and C, and defendants were in compliance with state law when it did not assign a paraprofessional to defendant Harmala's classroom. Plaintiff's injuries did not come about from defendants' acts, but are an unforeseeable result of a private actor. Id. at 1375. Therefore, defendants' motion to dismiss is granted.[1]

20 U.S.C. §1681 (Title IX)

Neither the Supreme Court, nor the Sixth Circuit has ruled whether the individual defendants or the school board is subject to liability under Title IX. Plaintiff contends that this court should broadly and liberally interpret Title IX to subject individuals to liability as "any part of" a school system. However, "[c]ourts that have addressed the question have held that only institutions may be liable under Title IX, not individuals." Petaluma I, 830 F.Supp. at 1576; Lipsett v. University of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988); Bowers v. Baylor Univ., 862 F.Supp. 142, 146 (W.D. Texas 1994); and Doe v. Lance, 1996 W.L. 663159 (N.D. Ind. 1996).

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[1] Additionally, plaintiff wrongfully claims that defendants' subsequent remedial measures can be admitted against them as an assertion of their guilt. This evidence is inadmissible to prove such an allegation for public policy reasons. Fed. R. Evid. 407.

We agree with these prior decisions and conclude that the individual defendants should not be subject to liability under Title IX; it is the educational institutions that are subject to suit under Title IX. While the Sixth Circuit has not addressed the question of individual liability under title IX, it has held that individual employees cannot be held liable under Title VII. Wathen v. General Elec. Co., 115 F.3d 400, 404 (6th Cir. 1997). Title VII and Title IX are so analogous in the purposes for their enactment, we should not interpret Title IX any differently than Title VII without a clear directive from Congress. Petaluma I, 830 F.Supp. at 1577. Accordingly, we too conclude that remedies under Title IX are available against an "education program or activity receiving Federal financial assistance," not against individuals.

Defendants further contend that the Huron Valley School Board is not subject to liability because it is part of a fourth class school district. The Michigan Court of Appeals in Carlson v. North Dearborn Heights Bd. of Ed., held that "a fourth-class school board . . . is not a corporate body which may sue or be sued." 157 Mich. App. 653, 568 (1987). Defendants reliance on this case is misplaced, as plaintiff is suing the school board under federal law, not state law. In a recent decision, the Eleventh Circuit held that a student could not sue a school board for student-on-student sexual harassment. Davis v. Monroe County Bd. of Ed., 120 F.3d 1390, 1406 (11th Cir. 1997). In Davis, a fifth grader complained of eight separate incidents of sexual misconduct by another student to faculty members as well as the principal. Id. at 1392. The court held that "Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying

student-student sexual harassment when they chose to accept federal financial assistance under Title IX." Id. at 1406.

Plaintiff failed to provide facts that show that defendant School Board was on notice of the conduct that occurred. The School Board was not directly responsible for the evils that plaintiff suffered. Title IX was not established to hold a school board directly liable for third-party misconduct. Plaintiff must show direct participation by the school board that lead to the harms she has endured. See Id. at 1407 (concurring opinion). The Huron Valley School Board's "motion for summary judgment" is granted.

Similarly, the question whether a School District can be held liable under Title IX for student-on-student sexual harassment has not been considered in this circuit or the Supreme Court. Title IX provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C.A. § 1681 (West 1990). However, the Supreme Court did recognize a claim for hostile work environment sexual harassment in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). As a result, several courts have adopted the Title VII hostile work environment frame work to be used in Title IX actions. See Davis, 120 F.3d at 1390; Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), cert. denied,

117 S.Ct. 165 (1997); Londonderry, 970 F.Supp. at 64; Petaluma II, 949 F.Supp. at 1415; Nicole M. v. Martinez Unified School Dist., 964 F.Supp. 1369 (N.D.Cal. 1997). Nearly all the cases that have addressed this issue have found that under certain circumstances a school district may be liable for failing to respond to student-on-student sexual harassment.

The Fifth Circuit takes a rigid approach that is not entirely based upon Title VII. In the Firth Circuit, unless there is sexual harassment of boy students or girl students, and girls are treated differently just because they are girls, then no cause of action is available. Rowinsky, 80 F.3d at 1016. This view does not take into consideration that inaction alone by the district could subject them to liability. For that reason alone, we reject the Fifth Circuit's approach.

The approaches of the Tenth Circuit and the court in Londonderry are similar, except that the Tenth Circuit requires that some basis of district liability be established, Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996), and in Londonderry it must be shown that the district knew of the harassment and intentionally failed to respond. 970 F.Supp. at 74. Neither of these approaches follow the spirit of Title VII. In Londonderry, the court requires the school district to know of the sexual harassment, but does not consider whether the school district should have known of the harassment. Additionally, the Tenth Circuit's intent requirement can be misleading, as intent requires intentional disparate treatment

based on gender and the act of implicitly condoning that disparate treatment by failing to take steps to remedy it.[2]

We find that the court's approach in Petaluma II is in accordance with Title VII. In Petaluma II, the court held that:

> Plaintiff was subjected to unwelcome harassment based on her gender, that the harassment was so severe or pervasive as to create a hostile educational environment, and that the Defendants knew, or should have known, of the hostile environment and failed to take prompt and appropriate remedial action.

Petaluma II, 949 F.Supp. at 1427. Under this test, defendant HVSD is not liable under Title IX. Clearly, accepting the allegations as true, plaintiff was subject to unwelcome harassment based on her gender; it was so severe that it caused a hostile educational environment; however, she did not produce evidence that defendant HVSD knew or should have known of the hostile environment and failed to take prompt and appropriate remedial action.

"The actual thrust of this type of claim, is to impose liability on the school district based not on the harassing conduct of its students, but on the district's own conduct of

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[2] Additionally, we find the Seventh Circuit took too restrictive of an approach in their recent decision in Doe v. University of Illinois, Nos. 96-3511, 96-4148, 1998 W.L. 88341 (7th Cir. 1998) (holding that a school district must actually know that the sexual harassment was taking place. Id. at *8.).

knowingly permitting the discriminatory hostile and abusive environment to continue and to inflict an ongoing injury on its female students." Id. at 1421. When plaintiff's mother informed defendant Harmala of her daughter's rape, it was the first time defendants became aware of the sexual harassment. Plaintiff has not provided evidence that the school board or the teachers should have been aware earlier that plaintiff was subjected to harassment. Although plaintiff asserts that Boy A has a checkered past, she has no evidence to support such an accusation. After the incidents were brought to the defendants attention remedial action was promptly taken to provide plaintiff with a safe educational atmosphere. It was Ms. Soper's choice to allow or not to allow plaintiff to return to school.

Plaintiff contends that Boys A, B, and C were allowed to stay in school thereby making plaintiff feel as if she was being punished. However, defendants did an internal investigation and could not substantiate plaintiff's accusations. Once the school was informed by the police department of the charges against Boy A, he was immediately expelled. No charges were ever brought against Boys B and C.

This is not to say that there are no circumstances under which a school district can be held liable under Title IX, however, this is not such a case. Plaintiff has not alleged that defendant HVSD knew or should have known of the sexual harassment she alleges she endured. Although plaintiff suffered an egregious harm, this harm was not inflicted upon her by the defendants, but by third-parties. Accordingly,

defendants' motion for summary judgment will be **GRANTED**.[3]

IT IS SO ORDERED.

/s/_____
Robert E. DeMascio
United States District Judge

Date: APR 1 1998

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[3] Additionally, because Mrs. Soper's claims are derivative upon her daughter's and the court has granted defendants' motion for summary judgment, Mrs. Soper has no basis on which she can make a claim upon which relief can be granted

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed December 6, 1999]

No. 98-1550

RENEE SOPER, a minor, by her mother and next friend, LINA SOPER; LINA SOPER, individually,
Plaintiffs-Appellants,

v.

CHRISTINE A. HOBEN; MICHELLE HARMALA; ROBERT SHAW; JAMES H. DOYLE; HURON VALLEY SCHOOL DISTRICT; BOARD OF EDUCATION OF THE HURON VALLEY SCHOOL DISTRICT, jointly and severally,
Defendants-Appellees.

BEFORE: KENNEDY, SILER, and MOORE, Circuit Judges.

Upon consideration of the petition fox rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

Supreme Court, U.S.
FILED
MAY 26 2000
CLERK

(2)

No. 99-1715

IN THE

Supreme Court of the United States

RENEE SOPER, a minor, by her mother and next friend, LINA SOPER and LINA SOPER, individually,

Petitioners,

v.

CHRISTINE A. HOBEN, MICHELE HARMALA, ROBERT SHAW, JAMES H. DOYLE, HURON VALLEY SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE HURON VALLEY SCHOOL DISTRICT, Jointly and Severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

The question raised by Petitioners is incomplete. They ask two things. First, is actual notice established when a parent informs a teacher of one incident of alleged sexual harassment? However, to be complete, the question should be if a parent, based on what his or her child says, repeats the information to the teacher, does that create actual notice without regard to the teacher's independent knowledge of the child's propensity for truth and the child's ability to properly perceive, remember, and relate? The second question, more properly stated, should be if the school district decides to take no action based on this one incident, does that, as a matter of law, establish deliberate indifference?

There is a third part to the question that should be addressed before the other two are even answered; i.e., was there sexual harassment that was so severe, pervasive, and objectively offensive that it deprived the plaintiff of access to the educational opportunities or benefits provided by the school? Since review of a grant of Summary Judgment by district court is *de novo*, issues regarding the determination of the facts by the district court should be framed relative to the appropriate standard of review.

Therefore, the proper questions become:

(1) Did the United States Court of Appeals for the Sixth Circuit Court correctly apply the standard of review in evaluating the admissible evidence, and allowable inferences therefrom, to the evidence submitted by the Petitioners; and

(2) Did the United State Court of Appeals for the Sixth Circuit Court correctly apply the legal standard established in the *Davis* case to the properly supported facts submitted by the Petitioners?

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COUNTER STATEMENT OF THE CASE

Petitioners infer in their Statement of the Case that the Sixth Circuit did not give proper consideration to the law established by the *Davis* decision and did not properly recognize the significance of certain facts contained in the record. This is simply not true. In applying the legal standard established in *Davis v. Monroe County Board of Education*, 526 U.S. 29, 119 S. Ct. 1161 (1999) to the set of facts in this case, the Sixth Circuit was well aware of the "previous incident" the Petitioners reference in their statement of the questions presented.[1] Further, the Sixth Circuit recognized that Mrs. Soper claimed she expressed concern about Boy A's abusive family background and that she didn't want her daughter left alone with Boy A. It also recognized, as well, that the teacher had two years of prior experience with Boy A as a student without observation of any sexually aggressive conduct. Additionally, the facts establish that the psychological evaluation of Boy A in May 1994 revealed no inappropriate sexual behavior. Petition, Appendix A, pp. 5a-6a. Further, there is no dispute in the record

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1. *The Factual Background* in the Sixth Circuit Opinion states:

> In 1993, while Renee was a student at Oxbow Elementary, Boy A (who is one or two years older than Renee and was then a student in Defendant Michelle Harmala's EMI classroom in the middle school) and Renee left the school boundaries together. Later, Renee told her mother that Boy A had kissed her and said that he could not wait for her to come to junior high. Mrs. Soper reported the incident to [the elementary teacher] and asked her to make sure that someone would keep an eye on Renee and Boy A so as to prevent any further incidents.

Petition, Appendix A, pp. 3a-4a.

that Renee also attended certain "mainstream" classes outside the special education program, and was permitted while in grade school with her parents' consent to walk to these classes unattended. Additionally, while still in grade school, Renee's parents gave the bus driver permission to drop Renee off in front of her home, whether or not anyone was present at the stop to receive her.

On October 6, 1994, there was a parent/teacher meeting at which Mrs. Soper and the teacher discussed a number of issues. Mrs. Soper mentioned nothing about Boys A, B, or C. The only thing mentioned that could even possibly relate to sexual harassment was a "bra-snapping" incident involving a male student other than one of Boys A, B, or C. It is also clear from the record that another subject discussed at this meeting was that Renee had been engaging in "story telling." When Mrs. Soper returned home, she talked to Renee about school and first learned of the rape and fondling. She reported this to the school and the school took immediate action. There is no claim that anything the school did after this notice in any way violated the standards set out in *Davis*.

Petitioners also wondered why the teacher left "Boy A and Renee alone in a classroom" and why that did not, along with other facts known to the teacher, constitute "deliberate indifference." However, the record is clear that the teacher did not knowingly leave the two students alone in the classroom. She allowed Boy A to accompany Renee to her locker in a public area to assist in getting the door open, but the students were able to sneak back in the room without the knowledge of the teacher and hide. It was only after the teacher left, locking the door behind her, that the assault occurred.

It is clear from the record that prior to the rape and fondling the only persons to whom Mrs. Soper said anything about Boy A were the elementary and middle school teachers. The only things that were mentioned were the "kissing incident" and the abuse suffered by Boy in the past. Nothing was ever mentioned about Boys B and C.

REASONS FOR DENYING THE WRIT

In May, 1999 when this Court decided the *Davis* case it examined in detail all the legitimate issues raised here. By incompletely defining the questions presented, Petitioners attempt to create new issues that simply do not exist.

Petitioners have defined the question presented as whether the school district had actual notice of sexual harassment and, having actual notice, whether it reacted with deliberate indifference. By doing so, they attempt to limit the discussion to only two parts of a three part test established by this Court in *Davis* for finding liability under Title IX. Framed this way, the question leaves out a significant part of the test which also requires that the sexual harassment be "so severe, pervasive, and objectively offensive" that it deprives the student of educational opportunities or benefits. The question cannot be stated without including this portion of the test. Further, the question presented assumes that one incident reportedly involving a kiss and a stated desire by Boy A to see Renee at the junior high school amounts to sexual harassment. Additionally, assuming that it was sexual harassment and that it actually happened, the question further assumes that even though the alleged activity occurred off of school grounds, it was sexual harassment upon which the school district could act. Based on the question presented, Petitioner argues that the Sixth Circuit Opinion directly conflicts with the Tenth Circuit's ruling in *Murrell v. School District # 1*, 186 F.3d 1238 (1999). This is not correct.

1.

THE SIXTH CIRCUIT APPLIED THE CORRECT STANDARD OF REVIEW IN EVALUATING THE EVIDENCE

Summary Judgment is granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule Civil Procedure 56(c). Once the moving party identifies elements of a claim or defense which it believes are not supported by evidence, the non-movement must present affirmative evidence tending to show a genuine dispute of fact in order to avoid Summary Judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). That is, the opposing party must set out sufficient evidence in the record to allow a reasonable jury to find for him at trial. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986). The opposing party must demonstrate that there is admissible evidence that will support its position. Inadmissible evidence is not sufficient. This is consistent with the rule that the party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact. *Celotex* at 327. There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec Ind. Co. v. Zena Radio Corp*, 475 U.S. 574, 587 (1986).

The adverse party may not rest upon the mere allegations or denials in the adverse party's pleadings, but the adverse party's response must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, Summary Judgment, if appropriate, shall be entered against the adverse party. *Liberty Lobby* at 256. The

plaintiff is not entitled to a trial merely on the basis of allegations; significant provative evidence must be presented to support the complaint. This requires more than "a scintilla" of evidence in support of this position. *Liberty Lobby* at 252.

Here discovery was closed when the district court ruled on the Motion for Summary Judgment. All provable facts were known to the court.

II.

THE SIXTH CIRCUIT OPINION IN THIS CASE IS NOT IN CONFLICT WITH THE TENTH CIRCUIT'S RULING IN *MURRELL*

In *Davis*, the Court did more than define the scope of behavior that Title IX prescribes, it determined the parameters of actionable "student-on-student harassment" in schools, holding that liability exists only where there is: (1) deliberate indifference to sexual harassment; (2) actual knowledge of the sexual harassment; and (3) sexual harassment that is so severe, pervasive; and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. *Davis* at 71. In adopting the "deliberate indifference" standard in *Davis* the Court relied upon *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). There the Court rejected a standard of liability for Title IX claims based upon the respondeat superior and/or constructive notice standard and adopted instead a deliberate indifference standard.

> . . . We hold that the damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged

> discrimination and to institute corrective measures on the recipients behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.
>
> We think, moreover, that the response must amount to a deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official that is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable for damages not for its own official decision, but instead, for its employee's independent action.

Id. at 289.

Applying this standard, the *Gebser* Court noted that Plaintiffs did not contend that they could prevail under the actual notice standard. *Id.*, 141 L. Ed. 2d at 292. Indeed, the Court noted that the fact that the school principal was aware that the teacher had made inappropriate sexual comments to Plaintiff and other students during class did not rise to the level of actual notice of discrimination. Likewise, the fact that the school district failed to promulgate and publicize an effective policy and procedure for sexual harassment claims, as required by federal regulation, was insufficient to establish

the requisite actual notice and deliberate indifference. *Id.*, 141 L. Ed. 2d at 293.

Applying the standards of *Gebser* to the present case, it is clear that Respondents did not have actual notice of the offending conduct as it was only allegedly reported to an employee and that they were not deliberately indifferent to the alleged discrimination once they received actual notice.

In this case, the Sixth Circuit stated the *Davis* test for liability, only in reverse order; *i.e.*, a claim under Title IX is stated when the plaintiff can

> show (1) that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; (2) that the funding recipient had actual knowledge of the sexual harassment; and (3) that the funding recipient was deliberately indifferent to the harassment.

Petition, Appendix A. p. 19a.

Petitioner argues that the decision in *Soper* is in direct conflict with the decision in *Murrell*. This is simply not so. *Murrell*, like *Soper*, was a case where the district court dismissed the plaintiff's claims. The district court did so, however, because it held that "Title IX provides no cause of action for a school's failure to prevent and remedy student-on-student sexual harassment and that the school district had no constitutional duty to protect [the student] from assaults by a fellow student." *Murrell* at 1239. The district court in *Soper*, however, applied the same standard that eventually became the law pursuant to *Davis*, but found that factual support was lacking. The district court ruled:

> When plaintiff's mother informed Defendant Harmala of her daughter's rape, it was the first time Defendant's became aware of the sexual harassment. Plaintiff has not provided evidence that the school board or the teachers should have been aware earlier that plaintiff was subjected to harassment. Although plaintiff was certain that Boy A has a checkered past, she has no evidence to support such an accusation. After the incidents were brought to Defendant's attention, remedial action was promptly taken to provide plaintiff with a safe educational atmosphere. It was Ms. Soper's choice to allow or not to allow plaintiff to return to school.

Petition, Appendix B, p. 46a.

The Tenth Circuit in hearing the appeal from the district court applied the standards set out in *Davis* just as the Sixth Circuit did in *Soper*. The only difference was that the Tenth Circuit made it a four-part test instead of a three-part test. The Tenth Circuit divided the third part of the test in *Davis* into two parts; *i.e.*, "(3) harassment that was so severe, pervasive, and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school." *Murrell* at 1246.

The only reason the outcome in *Murrell* was different is that the facts were so different. The student involved was developmentally disabled and functioning at the level of a first-grader. When she enrolled the principal of the school was informed that she had been sexually assaulted at her prior school. The John Doe in the *Murrell* case was known to have significant disciplinary and behavioral problems

which included engaging in sexually inappropriate conduct. Further, the teachers were aware that he was engaging in aggressive, sexually inappropriate conduct towards a plaintiff, and that he was making harassing phone calls to the plaintiff's home. Further, one of the sexual assaults was discovered in progress by a janitor who advised the teachers. The teachers took no action and not only failed to inform the mom, but attempted to conceal it. After this the plaintiff was sexually assaulted again. The teachers only informed the mom about the non-sexual part of the battery even though they may have known it involved sexual assault. Because of these incidents and because plaintiff began to engage in self-destructive and suicidal behavior, she left school and entered a psychiatric hospital. Only then did the mom learn about the sexual assaults. When the mom contacted the teachers, they denied the incidents and refused to discuss the matter. Following release from the hospital, the plaintiff attempted to return to school but stayed for only one day because she was battered again by Mr. Doe and ridiculed by other students. At a later meeting with the principal and the teachers, and the parents of both students, the principal suggested the contact might have been consensual even though Mr. Doe had admitted assaulting the plaintiff. During this time, the school district neither notified the appropriate law enforcement officials nor took any other corrective action. To say that these facts created a similar situation as that analyzed by the Sixth Circuit in *Soper* and, therefore, *Soper* is in conflict with the Tenth Circuit's Opinion in *Murrell* is totally groundless.

Petitioners have also argued that the quote from *Murrell* offered on page 10 of their petition establishes the factual similarity between the *Soper* case and the *Murrell* case. However, this quote as stated by Petitioners is incomplete

and only begins to recite the extensive list of sexual harassment perpetrated by Mr. Doe on the plaintiff in *Murrell*. To argue that this one item from the incomplete quotation was the one fact on which the Court relied is disingenuous as best. Further, in analyzing the difference in outcomes between the *Soper* and *Murrell* cases, it must be remembered that the dismissal of *Murrell* was based on Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim which requires the Court to take as true all well pled allegations, and the dismissal in *Soper* was based on Federal Rule of Civil Procedure 56(c) which allows dismissal where there is no genuine issue as to any material fact.

III.

THE RULINGS IN OTHER CIRCUITS ARE NOT IN CONFLICT WITH *MURRELL* AND *SOPER*

Since the ruling in *Davis*, seven circuits have applied its holding in ruling on appeals from district courts. However, only three circuits, including the *Murrell* and *Soper* decisions, have addressed student-on-student sexual harassment. The other decisions addressed other issues in light of Title IX and the *Davis* decision such as sexual harassment by a teacher (*Wills v. Brown University*, 184 F.3d 20 (1st Cir. 1999)); race discrimination (*Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2nd Cir. 1999)); racial discrimination and funding (*Powell v. Ridge*, 189 F.3d 387 (3rd Cir. 1999)); and the required fielding of womens' fast pitch softball and soccer teams (*Pederson v. Louisiana State University*, 201 F.3d 388 (5th Cir. 2000)).

The only other circuit court case to address student-on-student sexual harassment is *Reese v. Jefferson School District*, 208 F.3d 736 (9th Cir. 2000). In this case, the female plaintiffs on "senior skip day" behaved inappropriately and were disciplined by the school. On skip day, the members of the senior class were transported to a local state park. While at the park, the female plaintiffs hid in the stalls of the boys' bathroom. When a group of senior boys came into the bathroom to change clothes, the plaintiffs ran out of the stalls and threw water balloons at the boys. The school board held a special meeting and barred the plaintiffs from attending the commencement ceremony. The female plaintiffs filed a lawsuit alleging that they were merely retaliating for several acts of sexual harassment committed by the boys during the school year. However, prior to the school board hearing, they had never reported any harassment, and the record offered no evidence that the school district actually knew prior to the school board hearing of the alleged harassment of the female plaintiffs. The boys did not admit to any misconduct and the school conducted no further investigation.

The district court granted Summary Judgment in favor of the school. The Ninth Circuit upheld the dismissal. Although recognizing that the *Davis* decision grew out of *Gebser*, in formulating its opinion, it followed the test established in *Davis* in evaluating the facts. It's clear, therefore, that there is no conflict among the circuits on the application of the *Davis* case to claims of student-on-student sexual harassment.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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